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No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next friend of Jose Padilla,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES WALTER JONES AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub.L.No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. § 4001(a) precludes that exercise of Presidential authority.

2. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES WALTER JONES AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted sub nom., Rasul v. Bush*, No. 03-334 (U.S., dec. pending); *Sosa v. Alvarez-Machain*, No. 03-339 (U.S., dec. pending); *Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed a brief in this matter when it was before the court of appeals.

The Honorable Walter Jones and the Honorable Lamar Smith are United States Representatives from North Carolina and Texas, respectively. They strongly support the efforts of the Executive Branch to protect the American people by taking aggressive steps to defeat terrorist organizations that have declared war on the United States. Both supported the joint resolution adopted by Congress on September 18, 2001, Pub. L. 107-40, which authorized the President to use "all necessary and appropriate force" to defeat those organizations; they

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

believe that the joint resolution unquestionably authorizes the President to detain enemy combatants (both citizens and aliens) who take up arms against the United States in support of those organizations.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that when American military leaders determine that individuals should be detained as enemy combatants, the courts should be highly deferential to such decisions. *Amici* are concerned that the courts are ill-equipped to second-guess the President when, acting in his capacity as Commander in Chief, he makes decisions implicating sensitive matters of foreign policy, national security, or military affairs.

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Amici hereby adopt by reference the Statement contained in the brief for Petitioner.

Since September 11, 2001, the United States has been at war with al Qaeda, an international terrorist network that masterminded attacks on American civilians that day. Al Qaeda is an unconventional enemy; it does not control any sovereign territory of its own, and its troops do not wear uniforms in battle or otherwise comply with the rules of war. Nonetheless, there can be little doubt that the war continues

even though al Qaeda has been largely dislodged from its sanctuary in Afghanistan. *See, e.g.* "Al Qaeda Implicated in Madrid Bombings," *Washington Post* (March 15, 2004) at A1 (bombing of Spanish commuter trains on March 11, 2004).

Because al Qaeda does not maintain a standing army, there is no theater of battle in the traditional sense. Rather, the battlefield stretches from Asia through Africa and Europe and into the United States. Indeed, al Qaeda leaders have made clear that their ultimate goal is to destroy major American cities and to bring an end to American civilization. Accordingly, al Qaeda operatives apprehended in the United States can legitimately be said to have been captured on the field of battle.

Respondent Jose Padilla was taken into custody by the Justice Department in Chicago in May 2002 while he was attempting to re-enter the country on a commercial flight. Initially, he was held in New York City under a material witness warrant. On June 9, 2002, President George W. Bush issued an order designating Padilla an "enemy combatant" and directing that he be transferred to the control of the military, in whose custody he remains. According to Petitioner, Padilla is an al Qaeda operative who was trained in Afghanistan in 2001 in the use of explosives and who entered the United States in 2002 for the express purpose of building and detonating a "radiological dispersal device" in a major American city. *See* Declaration of Michael H. Mobbs ("Mobbs Decl."), ¶¶ 5-9, Pet. App. 169a-170a. The President "determined that Padilla posed a continuing, present and grave danger to the national security of the United States, and that detention of Padilla as an enemy combatant was necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* at 171a, ¶ 14. These determinations were based primarily on the

statements of two senior al Qaeda leaders who have been taken into American custody and whose other statements have proven reliable. *Id.* at 168a, ¶ 3.

Padilla has been detained at a military facility in South Carolina since June 9, 2002. He has not been charged with any crime and until recently had been denied contact with visitors, including attorneys. The American military initially determined that successful interrogation of Padilla required that he be denied any such contact. Declaration of Vice Admiral Lowell E. Jacoby at 8-9. On February 11, 2004, the U.S. Department of Defense (DoD) announced that it has decided to permit Padilla access to counsel "as a matter of discretion" because "DoD has determined that such access will not compromise the national security of the United States, and . . . will not interfere with intelligence gathering from Padilla." U.S. DoD, "News Releases: Padilla Allowed Access to Lawyer," *available at* www.defenselink.mil/releases/2004/nr20040211-0341.html.

On June 11, 2002 (two days *after* Padilla was transferred to military custody in South Carolina), Donna Newman (an attorney acting as next friend) filed a habeas corpus petition on Padilla's behalf. The petition, filed in U.S. District Court for the Southern District of New York, asked that Padilla be released from custody and be granted access to counsel. In a December 4, 2002 Opinion and Order, Judge Michael Mukasey decided several important issues with respect to the petition. Pet. App. 76a-166a. He ruled that President Bush had the authority to order the detention as an "enemy combatant" of an American citizen captured in the United States, and that detention may continue for the duration of hostilities regardless whether criminal charges have been filed. *Id.* at 118a-142a. He further ruled that American citizens so detained are entitled to file a federal court challenge to their

designation as enemy combatants, but that that designation should be reviewed under a highly deferential "some evidence" standard. *Id.* at 155a-162a. He further ruled that Padilla should be granted immediate access to counsel, to assist Padilla in marshaling evidence to challenge his designation as an enemy combatant. *Id.* at 142a-155a.

On March 11, 2003, Judge Mukasey denied the government's motion for reconsideration of that part of the Order that granted Padilla access to counsel. *Padilla v. Rumsfeld,* 243 F. Supp. 2d 42 (S.D.N.Y. 2003). Thereafter, both sides sought interlocutory review. On April 9, 2003, the district court certified six issues for interlocutory appeal, including: (1) the extent of the President's authority to detain as an enemy combatant an American citizen captured within the United States; (2) the standard of review to be applied by federal courts to such enemy combatant designations; (3) whether the district court acted properly in granting Padilla access to counsel for the purpose of garnering evidence in support of his petition; and (4) whether the district court properly exercised jurisdiction over the habeas corpus petition. *Padilla v. Rumsfeld,* 256 F. Supp. 2d 218 (S.D.N.Y. 2003). On June 10, 2003, the Second Circuit granted the parties leave to take an interlocutory appeal.

On December 18, 2003, a divided Second Circuit panel issued an opinion remanding the case to the district court with instructions to issue a writ of habeas corpus directing Petitioner Donald Rumsfeld to release Padilla from military custody within 30 days. Pet. App. 1a-75a. The appeals court ruled that Congress expressly prohibited military detention of American citizens when in 1971 it adopted 18 U.S.C. § 4001(a) (the "Non-Detention Act"), and that no legislation adopted in connection with the on-going war on terrorism created an exception to that prohibition. *Id.* at 2a-3a. The

court said that only "clear congressional authorization" is sufficient to overcome the Non-Detention Act's prohibition. *Id.* The court held that detention of American citizens could not "be grounded in the President's inherent constitutional powers" as Commander in Chief of the military, at least where (as here) the detention did not occur on a foreign battlefield. *Id.* at 3a. The court also held that jurisdiction over the petition could be exercised in the U.S. District Court for the Southern District of New York despite Padilla's detention in South Carolina since June 9, 2002 (several days before his habeas petition was filed). *Id.* at 13a-26a. The court also held that its ruling "effectively moots arguments raised by the parties concerning access to counsel, standard of review, and burden of proof." *Id.* at 4a n.1.

Judge Wesley concurred in part and dissented in part. *Id.* at 61a-75a. He argued that the President possesses "inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens," including the authority to detain American citizens who seek to carry out such acts. *Id.* at 62a. He also would have held that Congress has authorized such detentions. *Id.* at 67a-74a. He would have affirmed Judge Mukasey's Order in its entirety, including Judge Mukasey's rulings that he had jurisdiction over the habeas petition and that Padilla had improperly been denied access to counsel. *Id.* at 61a.

SUMMARY OF ARGUMENT

In its decision holding that the federal courts are not open to provide relief to nonresident aliens whom the Executive Branch has determined to be enemy combatants and who are being detained at overseas locations, this Court stated:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from [ongoing military offensives to] the legal defensive.

Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

Amici submit that the Second Circuit has met this Court's challenge: it has devised an even more effective method of fettering the American military than the scheme envisioned in *Eisentrager*. It has erected an absolute prohibition against military detention of an American citizen in connection with the on-going campaign to subdue al Qaeda (at least with respect to a citizen found within the United States), without regard to the strength of the military's evidence that the citizen is an al Qaeda foot soldier, that he intends to carry out attacks against the United States if not detained, and that he is capable of carrying out his plan.

The Second Circuit based its ruling on a 1971 federal law that (in the court's view) prohibits the military from detaining American citizens in the absence of "precise and specific language" in subsequent legislation authorizing such detention. Pet. App. 47a. The appeals court misconstrued both the 1971 law and 2001 legislation that gave Congress's blessing to military action against al Qaeda; the latter legislation quite clearly contemplated that the military would detain enemy combatants captured during such military actions, without regard to their citizenship.

The Second Circuit also misconceived the central role of the Executive Branch in military affairs. The Constitution appoints the President -- not Congress -- as Commander in Chief of the military. The detention of an enemy combatant is

not rendered any less a military affair simply because the enemy combatant is an American citizen or because his chosen battlefield is here in the United States. Any effort by Congress to interfere with the President's prerogatives regarding traditional military matters such as the detention of enemy soldiers likely would violate separation-of-powers principles. This Court can avoid deciding the constitutional issue by giving the laws at issue a straight-forward reading; under such a reading, Congress did not prohibit the detention of those, such as Padilla, who are determined by the military to be al Qaeda soldiers.

Padilla and all other American citizens must have a meaningful opportunity to challenge the factual and legal bases of their U.S. government detention, by filing habeas corpus petitions in federal court. As the thoughtful opinions of Judge Mukasey underscore, this case raises difficult issues regarding the right of access to counsel, burdens of proof, and the standard of review to be applied to a federal government "enemy combatant" determination. Those issues are not encompassed within the Questions Presented, however. Because the Second Circuit has not yet addressed those issues, the Court should decline Padilla's invitation to do so in the first instance.

Finally, *amici* agree with Petitioner that the Southern District of New York lacked jurisdiction to hear this case because neither Padilla nor his immediate custodian was located there at any relevant time. Nonetheless, in light of this Court's broad jurisdiction over habeas corpus actions, *amici* suggest that the most appropriate course of action is to address the substantive issue raised by the Petition, rather than to direct dismissal of the underlying habeas corpus petition for lack of jurisdiction. In the event that the Court reverses the Second Circuit and a remand is in order, the case should be remanded

to the District of South Carolina, where both Padilla and his immediate custodian are located.

ARGUMENT

I. THE PRESIDENT HAS THE POWER TO DETAIN ENEMY COMBATANTS, REGARDLESS OF THEIR CITIZENSHIP OR PLACE OF CAPTURE

Throughout our nation's history, the military regularly has detained enemy combatants captured in connection with military operations -- both within American territory and overseas. Indeed, detention of enemy combatants without charges until the cessation of hostilities is the well-accepted norm under the laws of war. *See, e.g., Ex Parte Quirin*, 317 U.S. 1, 28, 31 (1942) ("An important incident to the conduct of war is . . . to seize" enemy combatants; both lawful and unlawful combatants "are subject to capture and detention"); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured.").

The decision below stands in sharp contrast to that history. Without questioning the President's findings that Padilla is an enemy combatant who has committed hostile and war-like acts at the behest of al Qaeda and that his detention is necessary to prevent him from attacking the United States, *see* Pet. App. 171a, the Second Circuit held that the President lacks the authority to order Padilla's detention. *Id.* 26a-55a.

That challenge to the President's authority as Commander in Chief of American military forces is as misguided as it is unprecedented. Congress explicitly authorized the President to use "all necessary and appropriate force" against all nations

or organizations (including, most obviously, al Qaeda) involved in the September 11, 2001 attacks on the United States. In light of the centuries-long military practice of detaining captured enemy combatants for the duration of hostilities, Congress can only be understood to have authorized the President to detain any and all al Qaeda operatives. Moreover, even in the absence of such congressional authorization, the President's inherent constitutional authority as Commander in Chief is sufficient to uphold his decision to detain Padilla.

A. Congress Authorized the President to Detain al Qaeda Military Operatives Without Regard to Citizenship or Place of Capture

The Court need not address the precise scope of the President's authority to detain enemy combatants in the absence of congressional authorization, because Congress has so clearly authorized the President to detain al Qaeda military operatives without regard to citizenship or place of capture.

The Second Circuit based its ruling to the contrary on the 1971 Non-Detention Act, 18 U.S.C. § 4001(a), which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." As the government has pointed out, there is significant reason to believe that Congress intended § 4001(a) to apply only to civilians, not to enemy combatants who happen to be citizens. But even if the statute is interpreted as applying to *all* citizens, it clearly contemplates situations in which citizens may be detained by the federal government -- *i.e.*, in those instances in which detention is authorized by "an Act of Congress."

Immediately following the September 11, 2001 attacks, Congress enacted an authorization of the type contemplated by § 4001(a). It enacted a resolution expressing its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001). *See* Pet. App. 59a-60a. The President has determined that al Qaeda is such an organization; he has authorized the use of military force against al Qaeda and its operatives in Afghanistan and throughout the world. It is uncontested that the military campaign against al Qaeda continues unabated, and that al Qaeda continues to pose a substantial threat to national security. Given that the "necessary and appropriate force" used by the American military has included killing numerous al Qaeda personnel, it stands to reason that the authorized force also includes the lesser power to capture and detain al Qaeda personnel. Nothing in the AUMF limits the authorization to actions taken overseas[2] or against noncitizens. Accordingly, the AUMF is "an Act of Congress" of precisely the sort contemplated by § 4001(a).[3]

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[2] Indeed, the AUMF explicitly contemplated that the President's "necessary and appropriate force" might include actions taken within the United States. The AUMF stated that the September 11, 2001 attacks rendered it both necessary and appropriate for the federal government "to protect United States citizens both *at home* and abroad." Pet. App. 59a (emphasis added).

[3] The AUMF was denominated by Congress as a "joint resolution." Nonetheless, for all the reasons explained by the district court, a "joint resolution" qualifies as "an Act of Congress" within the meaning of § 4001(a). *See* Pet. App. 139a-141a.

The Second Circuit arrived at its contrary conclusion only by reading far more into § 4001(a) than its language will bear. It held that § 4001(a) permits detention of an American citizen only when Congress adopts legislation that includes "precise and specific language authorizing the detention of American citizens." Pet. App. 47a. But § 4001(a) includes no such requirement. The statute permits detentions "pursuant to an Act of Congress." Nothing in the language of § 4001(a) suggests that Congress intended to prohibit detention of citizens in the absence of statutory language making explicit reference to detention, even when (as here) the natural reading of a subsequently enacted statute indicates that Congress intended to permit the detention of certain enemy combatants without regard to their citizenship.

In support of its view that the powers conferred by the AUMF should be "strictly limited," the Second Circuit cited a statement made by U.S. Representative Lamar Smith, one of the *amici curiae* who have joined this brief, during floor debates on the AUMF. Pet. App. 53a. The citation suggests that the Second Circuit was asserting that Rep. Smith did not believe that the AUMF authorizes detention of U.S.-citizen al Qaeda operatives captured on American soil.[4] That assertion is incorrect. Rep. Smith believed at the time, and still believes, that the AUMF authorizes the President to take all appropriate military action to eliminate the threats to national security

[4] The Second Circuit quotes Rep. Smith as follows: "This resolution should have authorized the President to attack, *apprehend*, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday. This is a significant restraint on the President's ability to root out terrorism wherever it may be found." 147 Cong. H5654 (Sept. 14, 2001) (emphasis added).

posed by al Qaeda; and that the AUMF's authorization is not limited to overseas operations or to actions against noncitizen al Qaeda operatives. As a fair reading of Rep. Smith's statement indicates, his only criticism of the AUMF was that it failed to endorse the same broad military actions against other international terrorist organizations that it endorsed with respect to al Qaeda.[5]

Padilla's effort to compare his detention to detention under the (repealed and largely discredited) Emergency Detention Act of 1950, 50 U.S.C. § 812, 64 Stat. 1019 (1950), is not well taken.[6] That act permitted the President to detain individuals if he had reason to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at § 813. While the repeal of the Emergency Detention Act is a strong indication that Congress has not authorized detention of citizens based on a mere suspicion of *future* criminal activity, Padilla is not being detained on such grounds. Rather, he is being detained because the President has determined that he is an al Qaeda operative and has already conspired to build and detonate "dirty bombs" in major American cities. Mobbs Decl. ¶¶ 5-9, Pet. App. 169a-170a.

Padilla also cites the Patriot Act to support his contention that the AUMF does not authorize his detention:

[5] That intended meaning is borne out by another portion of Rep. Smith's statement that the Second Circuit chose not to cite: "Terrorism is not confined to a single organization or a single group or a specific sect. All terrorists, even those not directly connected to this week's attacks, are a deadly threat and must be neutralized." *Id.* at H5654.

[6] As Padilla noted in his Second Circuit brief, the Emergency Detention Act of 1950 was repealed in 1970 by the Non-Detention Act.

> Shortly after the September 11 attacks, the same Congress that passed AUMF passed the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Unlike the AUMF, the Patriot Act expressly gives the Executive authority to detain without charges aliens suspected of terrorist ties for short periods of time before initiation of criminal or removal proceedings. 8 U.S.C. § 1226a(a). The limitations in the Patriot Act prove that Congress has not, in the AUMF, already delegated to the Executive unfettered discretion to detain *anyone, indefinitely*, without charge.

Op. Cert. at 15 n.9.

Padilla's reliance on the Patriot Act is not well taken. The Patriot Act permits *the Justice Department* to detain certain aliens without charges. In contrast, the AUMF addresses actions by the military. The Patriot Act permits detention of several broad categories of aliens, including aliens with ties to any terrorist group. 8 U.S.C. § 1226a(a)(3). In contrast, the AUMF focuses solely on al Qaeda operatives (and any other group involved in the September 11 attacks). Rules adopted by Congress regarding Justice Department detention of one group of individuals has very little bearing on Congress's intent with respect to military detention of another, far smaller group of individuals.

Padilla also argues that if the AUMF were interpreted as permitting detention of enemy combatants affiliated with al Qaeda, even when the combatants are U.S. citizens captured in the U.S., § 4001(a) would no longer serve its intended purpose of imposing strict limitations on detention of citizens:

> The Non-Detention Act would not have achieved its purpose of preventing a recurrence of the Japanese

> internment camps if it could be satisfied by a mere declaration of war or use of military force, for there had been such a congressional declaration of war at the time of the Japanese internment camps themselves.

Op. Cert. at 13 n.7.

There is no similarity between the President's decision to detain two American citizens without criminal charges as enemy combatants and the World War II detention of thousands of American citizens of Japanese ancestry. The internment of those citizens has been justly condemned because there was no showing that any of the detainees was disloyal or posed a threat to national security; rather, they were detained based solely on racial consideration. *Ex Parte Endo*, 323 U.S. 283, 302 (1944) ("A citizen who is concededly loyal presents no problem of espionage or sabotage. . . . When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."). Conversely, once the President determined that Padilla is an al Qaeda operative intent on blowing up a major American city, he would have been derelict in his duties as Commander in Chief were he not to detain Padilla for the duration of hostilities.

The Second Circuit's conclusion that the AUMF did not authorize detention of U.S. citizens captured in the U.S. and determined to be al Qaeda operatives appears to have been colored by its belief that there is something unusual about this nation detaining U.S. citizens as enemy combatants. That belief is support by neither our history nor case law. *Quirin* could not be clearer that Padilla's American citizenship does not affect the President's authority to hold him as an enemy combatant. *Quirin* involved habeas corpus petitions filed by eight men detained as saboteurs fighting for Nazi Germany

during World War II. The Court assumed that at least one of the eight was a U.S. citizen but held that citizenship was irrelevant to its decision:

> Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.

Quirin, 317 U.S. at 37-38. *See also Territo*, 156 F.2d at 145 ("We have reviewed the authorities with care and have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.").

It is true that the American enemy combatant at issue in *Quirin*, Herbert Haupt, was also being charged before a military tribunal as an *unlawful* combatant (because he was alleged to have sneaked into the United States to destroy war industries). But the Court made quite clear that Haupt was subject to detention as an enemy combatant without regard to the claim that he had violated the laws of war. *See, e.g., Quirin*, 317 U.S. at 31.

The American Civil War well illustrates the proposition that American citizens can be detained as enemy combatants without hearing. During the course of that war, thousands of American citizens were detained without hearing as prisoners of war after being captured while fighting for the Confederate army, yet *amici* are aware of no case law challenging the federal government's authority to engage in such detentions. Indeed, in support of its contention that unlawful combatants can be tried and ordered executed by military tribunals without interference from civilian courts, *Quirin* cited numerous cases

involving Americans detained, tried, and punished by military tribunals for their unlawful conduct during the Civil War on behalf of the Confederate army. *Id.* at 31-33 & n.10.[7]

Nor does history suggest that the military should be barred from applying the laws of war to Padilla simply because he was detained in Chicago rather than overseas. Padilla may not have been detained on a foreign battlefield, but neither was Herbert Haupt,[8] yet that fact did not prevent the Court in *Quirin* from holding Haupt subject to the laws of war. The Court explained that the key prerequisite to application of the laws of war was whether an individual was "a part of or associated with the armed forces of the enemy," *id.* at 45, not the location of capture. Similarly, in *The Prize Cases*, the Court held that nonmilitary cargo belonging to American citizens living in Confederate states was properly seized under the laws of war as "enemies' property" regardless that the property was seized on the High Seas and not in any military zone. *The Prize Cases*, 67 U.S. (2 Black) 635, 674 (1862).

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[7] *Quirin* also makes clear that the Second Circuit's reliance on *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), is not well placed. *Milligan* held that a civilian may not be tried by a military tribunal "where the courts are open and their process unobstructed." *Id.* at 121. *Quirin* pointed out that the Court in *Milligan* had relied heavily on the fact that Milligan was a resident of Indiana (a State not in rebellion during the Civil War) and, although alleged to have engaged in insurrection, had no direct connection to the Confederate army. *Quirin* construed *Milligan* not to limit the power of the federal government to apply the law of war to American citizens, but rather to mean only that the law of war is inapplicable to those "not being a part of or associated with the armed forces of the enemy." *Quirin*, 317 U.S. at 45.

[8] He and the seven other Nazi saboteurs were arrested in Chicago and New York City after sneaking into the United States by sea at Ponte Vedra Beach, Florida and Long Island, New York.

In adopting the AUMF, Congress explicitly recognized that al Qaeda posed a threat to American citizens "both at home and abroad." Pet. App. 59a. In light of that recognition, there is no reason to conclude that Congress nonetheless intended to authorize military action against al Qaeda in overseas locations only. In sum, there is every reason attribute to the language of the AUMF ("authorized to use all necessary and appropriate force") its plain meaning. That language indicates that Congress authorized the President to conduct this war as past wars have been conducted, including authorization to detain enemy combatants without regard to citizenship or location of capture.

B. The AUMF Should Be Interpreted to Authorize Padilla's Detention in Order to Avoid Any Conflict with the President's Inherent Constitutional Powers

The Second Circuit's interpretation of the AUMF is particularly problematic because it denies to the President the pre-eminent role assigned to him by the Constitution in military and foreign policy matters. If the AUMF really had been intended to deny the President authority to detain individuals whom the President has determined to be enemy combatants, separation-of-powers principles would call the constitutionality of the AUMF into serious question. The Court can avoid those concerns by interpreting the AUMF as authorizing Padilla's detention -- an interpretation that (as demonstrated above) is well supported by the AUMF's language.

Indeed, the Second Circuit readily conceded that "great deference is afforded the President's exercise of his authority as Commander-in-Chief." Pet. App. 30a. The President's pre-eminent role in military and foreign policy matters was recognized by the Founding Generation and has continued to

be recognized by this Court. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'") (quoting U.S. Representative John Marshall (10 *Annuls of Cong.* 613 (1800))). *See also Zadvydas v. Davis,* 533 U.S. 678, 696 (2001) ("heightened deference to the judgments of the political branches with respect to foreign policy" is particularly warranted with respect to terrorism-related issues); *Rostker v. Goldberg,* 453 U.S. 57, 66 (1981); *Quirin*, 317 U.S. at 25; *The Three Friends*, 166 U.S. 1 (1897); *The Prize Cases*, 67 U.S. (2 Black) at 670. As Alexander Hamilton reasoned in the Federalist Papers:

> [T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms [a vital] and essential . . . definition of the executive authority.

The Federalist No. 74 at 447 (Clinton Rossiter, ed., 1961).

In his first *Pacificus* essay, his 1793 defense of President Washington's proclamation of neutrality, Hamilton outlined his broad vision of the President's broad authority over military and foreign policy matters. He observed:

> It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly -- and ought to be extended no further than is essential to their execution.

15 *The Papers of Alexander Hamilton* 42 (Harold C. Syrett, ed., 1969). *See generally*, H. Jefferson Powell, "The Founders and the President's Authority Over Foreign Affairs," 40 WM. & MARY L. REV. 1471 (1999).

The Second Circuit nonetheless insisted that the President's Commander-in-Chief powers do not authorize him to detain U.S.-citizen enemy combatants captured in the United States, because such detentions constitute actions "exercised in the domestic sphere." Pet. App. 32. The court held that Executive actions taken in that sphere are subject to control by Congress: "'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring)). Relying on Justice Jackson's concurring opinion in *Youngstown*, the appeals court determined that any decision to abridge the rights of citizens during wartime must come from Congress, not the President:

> The Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberty during such times. . . . Here, the Executive lays claim to the inherent emergency powers necessary to effect such abridgements, but we agree with Padilla that the Constitution lodges these powers with Congress, not the President.

Id. at 35a.

The appeals court's reliance on *Youngstown* is misplaced. The appeals court misperceived the distinction *Youngstown* attempted to draw between the external and domestic spheres. That case was a challenge to President Truman's April 1952 executive order, temporarily taking possession of steel plants

to avoid a work stoppage arising from a labor dispute between steel companies and organized labor. In striking down the executive order, the Court held that the President's military powers could not justify seizing steel mills (based on a claim that steel production was critical to the Korean War effort):

> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military commanders.

Youngstown, 343 U.S. at 587.

The quoted passage makes clear that the President's military powers were unavailing *not* because he was attempting to invoke them within the borders of the United States. Rather, those powers were unavailing because labor disputes at privately owned domestic steel mills could not reasonably be deemed a part of the "theater of war." In contrast, President Bush's decision to detain Padilla after determining that he is an enemy combatant is precisely the type of decision routinely made by military commanders in the exercise of their military powers. *Youngstown* makes clear that the President is not prohibited from exercising those powers in this case simply because the "theater of war," for the first time since the Civil War, now includes U.S. territory.

Indeed, it makes little sense to suggest that the President's constitutional authority over military affairs is less extensive in a war fought to repel foreign invasion than in an oversees war.

The Second Circuit majority had no effective rejoinder to Judge Wesley's criticism that the majority's position -- that the President lacks inherent authority to detain enemy combatants under the circumstances of this case -- leaves a major chink in the nation's armor:

> The majority's view that "the Constitution lodges [inherent national emergency powers] with Congress not the President," . . . produces a startling conclusion. The President would be without authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention.

Pet. App. 66a.

The majority's only response was that "the President's authority to detain such a person is not an issue raised by this case" because Padilla was already been detained under a material witness warrant before he was designated as an enemy combatant. *Id.* at 42a n.27. But that statement does not adequately respond to Judge Wesley. The Executive Branch may not detain an enemy combatant indefinitely under a material witness warrant. If the President lacks inherent authority to detain enemy combatants, then sooner or later he will be required to release the combatants -- regardless that the war continues and that the combatants would be in a position to resume their belligerence toward the United States.

Nor is it sufficient to suggest that the President initiate criminal proceedings and to detain the enemy combatant pursuant to those proceedings. Proving that Padilla is an al Qaeda operative presumably would require the military to provide the in-court testimony of captured al Qaeda leaders who have implicate Padilla. It is unlikely that the government ever would be able to elicit such testimony from al Qaeda leaders who themselves are being held without trial as enemy combatants. Moreover, any attempt to elicit such testimony would be sufficiently disruptive of the war effort that one could reasonably expect that military leaders would release Padilla before resorting to such an attempt.

In sum, any decision that would interpret the AUMF as denying the President authority to detain U.S.-citizen enemy combatants captured domestically would raise serious concerns regarding the AUMF's constitutionality. In order to avoid those concerns, the Court should interpret the AUMF as authorizing Padilla's detention.

II. THE SOUTHERN DISTRICT OF NEW YORK LACKED JURISDICTION OVER PADILLA'S HABEAS PETITION

Congress has authorized writs of habeas corpus to be granted "by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a). This Court has held that the phrase "within their respective jurisdictions" (contained in the predecessor to § 2241(a)) to limit proceedings to the federal district in which the petitioner is detained. *Carbo v. United States,* 364 U.S. 611, 617 (1961); *Wales v. Whitney*, 114 U.S. 564 (1885).

Padilla has been detained in the District of South Carolina since June 9, 2002. When he filed his habeas petition several days thereafter, he filed in the Southern District of New York. A straightforward application of *Carbo* and *Wales* would seem to have required the Second Circuit either to dismiss the petition or to order its transfer to South Carolina pursuant to 28 U.S.C. § 2241(b). The Second Circuit nonetheless rejected the government's efforts to dismiss the petition on jurisdictional grounds, ruling that the Southern District of New York could properly exercise jurisdiction over the petition and that Secretary of Defense Donald Rumsfeld (rather than Padilla's immediate custodian in South Carolina, Commander Melanie A. Marr) was a proper respondent. Pet. App. 13a-26a.

The Second Circuit's novel approach to habeas jurisdiction has little to recommend it and ought to be reversed. Other appeals courts have regularly applied § 2241(a) to require, in all but exceptional cases, that habeas petitions be filed in the district in which the petitioner is being detained -- in this case, South Carolina. Enforcing § 2241(a) in that manner furthers predictability in the law, discourages forum shopping, and distributes habeas petitions relatively equally among the federal district courts. *al-Marri v. Rumsfeld*, ___ F.3d ___, 2004 U.S. App. LEXIS 4445, at *9 (7th Cir., March 8, 2004) (detention of alien designated as enemy combatant) (Easterbrook, J.).

The Second Circuit reasoned that jurisdiction in New York was appropriate because: (1) Secretary Rumsfeld played "an extraordinary and pervasive role" in Padilla's detention as an enemy combatant, Pet. App. 20a; and (2) Rumsfeld was amenable to service of process under New York's long-arm statute. *Id.* at 25a. But the Second Circuit's approach essentially permits detainees in Padilla's position to file their

petition in *any* federal district court across the country. Such a rule is a recipe for forum shopping. In the absence of evidence that Padilla could not get a fair hearing in the District of South Carolina, he should have been required to file there.

The government argues that Rumsfeld is not a proper respondent in this habeas action, and that the only proper respondent is Commander Marr, Padilla's immediate custodian. *Amici* do not believe that the precise identity of the respondent makes a material difference in this case; the far more important issue from *amici*'s perspective is where the petition should be filed. Under § 2241(a), the clear answer in this case is the District of South Carolina.

Amici recognize that determining where the petitioner is being detained can sometimes raise difficult legal issues. For example, in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), the Court was faced with a habeas petition filed by a prisoner being held by Alabama but against whom Kentucky had filed a detainer, based on a pending Kentucky indictment. The prisoner sought dismissal of the Kentucky indictment on speedy trial grounds. This Court held that the prisoner could be deemed in the custody of both states and thus that he had acted properly in seeking habeas relief from the Kentucky indictment in the Western District of Kentucky. *Braden*, 410 U.S. at 500. But the Court never suggested that a habeas petitioner is free to file in any and all districts in which he is able to obtain long-arm jurisdiction over an appropriate respondent. Rather, *Braden* indicated that the general rule (that petitions should only be filed in the district in which the petitioner is being held) could be relaxed in those instances in which the general rule "would serve no useful purpose" and would dictate the choice of "an inconvenient forum." *Id.* at 499-500. In the absence of evidence that Padilla would have

been prejudiced by being forced to litigate in South Carolina, the Second Circuit erred in failing to transfer the case.

The greatest virtue of following the general rule in most cases (requiring the petitioner to file in the district in which he is physically located) is its predictability and ease of application. In contrast, the Second Circuit's approach, which looks to the location of the individual ultimately responsible for the detention decision, suffers from an utter lack of predictability; the identity of that individual inevitably will be subject to dispute. Moreover, allowing petitioners to file in the jurisdiction of their choice not only encourages forum shopping but also encourages courts (inappropriately, in *amici*'s view) to certify nationwide class actions that challenge federal detention policies. *See, e.g., Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003).

Nonetheless, although (under the general rule) the Southern District of New York lacked jurisdiction to hear this petition, *amici* do not believe that the Court should dismiss the petition on jurisdictional grounds. *Amici* believe that the substantive issues raised by the petition are suffiently important that the Court should seek to rule on those issues if at all posible. Because § 2241(a) grants original jurisdiction to this Court, the Court would not be remiss if it invoked that grant to retain jurisdiction over the case.

For the reasons previously stated, if a remand is required, the Court should remand the case to the District of South Carolina, the district in which the petition should have been filed initially.

CONCLUSION

Amici curiae respectfully request that the decision of the court of appeals be reversed. They further request that the case be remanded to the District of South Carolina for consideration of issues not yet addressed by the Second Circuit, including access to counsel, standard of review, and burden of proof.

Respectfully submitted,

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